

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City Of Delano,

Complainant,

vs.

Union Pacific Railroad Company,

Defendant.

Case 02-07-020
(Filed July 15, 2002)

SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER

Summary

Pursuant to Rules 6(b)(3) and 6.3 of the Commission's Rules of Practice and Procedure (Rules),¹ this ruling sets forth the schedule, assigns a presiding hearing officer, and addresses the scope of the proceeding, following a prehearing conference (PHC) held on September 24, 2002.

Background

Complainant City of Delano (City) alleges that defendant Union Pacific Railroad Company (UPRR) has failed to maintain properly seven at-grade crossings (the surface crossings) in the City, in violation of General Order

¹ Unless otherwise indicated, all subsequent citations to rules refer to the Rules, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

(GO) 72-B. The City asserts that Commission staff agree that the crossings are in need of repair.

The City also claims that UPRR has failed to maintain warning devices at many crossings in the City, in addition to those identified as having surface problems. The City seeks an order requiring UPRR to update the warning devices at all crossings in the City.

UPRR asserts that, although the surface crossings may be in deteriorated condition, they are not in violation of GO 72-B. UPRR also takes the position that the warning devices complained about by the City are not defective or malfunctioning, and that, in any event, the condition of the warning devices is not in violation of GO 75-C or other requirements.

UPRR also raises the purely legal defenses that GO 72-B is not retroactively applicable to the surface crossings, the Commission is not conforming to applicable federal law on warning devices, and that federal law preempts the Commission's regulation of maintenance, inspection, and testing of grade crossing signal systems.

Scope of the Proceeding

Prior to the PHC, counsel for the City and UPRR met and developed a list of issues. After some discussion and modification of the proposed list at the PHC, all parties agreed on the issues in dispute, as set forth below.

Evidentiary hearings will be necessary to resolve the disputes that are expected to remain after the parties complete discovery.

At this time, the material facts in dispute include the following:

Surfaces

- whether the conditions of the roadway surfaces at the surface crossings are unsafe and/or need repairs;
- whether the City has entered into any agreements with UPRR relating to maintenance and/or reconstruction of the surface crossings;
- whether any of the surface crossings should be closed; and
- how costs should be allocated between UPRR and the City for work at the surface crossings.

Warning Devices

- whether the existing warning devices at various crossings in the City are unsafe and/or need replacement;
- whether the City's complaints relate to the condition of the warning devices themselves or to other unrelated issues (*e.g.*, broken gates, gates triggered by switching moves, vandalism, etc.);
- whether the warning devices at various crossings should be replaced; and
- how costs should be allocated among the City, UPRR, and the state when the City has requested upgrades to existing signalized warning devices.

At this time, the legal issues in dispute include the following:

Surfaces

- whether GO 72-B applies to the surface crossings;
- whether, in particular, Standard No. 8 (concrete crossings) in GO 72-B applies to the crossings;
- whether UPRR can be compelled to reconstruct public crossings at its own expense;

- whether the City has financial responsibility for paveouts at the surface crossings beyond the area specified as railroad responsibility in GO 72-B;
- whether the City is responsible for bringing the approaches and connection roadways at the surface crossings into compliance with applicable standards of the Federal Highway Administration (FWHA) and CalTrans; and
- whether the City can be required to arrange for road closures during construction.

Warning Devices

- whether the Commission has regulatory authority over maintenance, inspection, and testing of grade crossing signal systems that extends to the claims in the City's complaint;
- whether the Commission has authority to order replacement of warning devices inspected and approved by the Federal Railroad Administration;
- whether the Commission is preempted from acting on the City's claims about the warning devices by provisions of the FWHA Manual on Uniform Traffic Control Devices, the Federal Railroad Safety Act and/or the ICC Termination Act of 1995; and
- what standards should be applied to evaluate the adequacy of existing warning devices at various crossings.

The first three of the legal issues related to the warning devices raise various challenges to the Commission's legal authority to act on the claims in the complaint. The parties are reminded that the Commission's authority to decide such challenges to its authority is itself limited by Art. III, Sec. 3.5 of the California Constitution.² The issues identified here, therefore, are germane to

² The section provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

Footnote continued on next page

this proceeding only to the extent that they do not fall within the constitutional prohibitions.

Discovery

The parties intend to pursue discovery through voluntary exchange of information. If any party considers formal discovery to be necessary, formal discovery shall proceed as set out in the schedule below. Should any discovery disputes arise, the parties must meet and confer in a good faith effort to resolve them. If that fails, any party may file a written motion in accordance with Rule 45.

Parties shall follow the requirements set forth in the Appendix regarding prepared written testimony and exhibits.

Schedule

Prior to the PHC, the City and UPRR began settlement discussions. At the PHC, they agreed to include staff in settlement efforts. The parties stated their intention to continue to try to settle this matter, while meeting the requirements of the schedule.

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- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
 - (b) To declare a statute unconstitutional;
 - (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

The parties have agreed to the following schedule for this proceeding:

Ongoing	Parties undertake voluntary exchange of information
November 8, 2002	Formal discovery begins, if necessary
January 3, 2003	End of formal discovery
January 10, 2003	Concurrent distribution of prepared testimony to all parties, with copy to ALJ
January 22, 2003	Concurrent distribution of prepared reply testimony, if any, to all parties, with copy to ALJ
January 28—31, 2003 10:00 a.m. to 4:00 p.m.	Evidentiary Hearing in Delano (location to be determined)
March 3, 2003	Concurrent initial briefs
March 14, 2003	Concurrent reply briefs, if any; submission of case
May 14, 2003	Presiding Officer's decision filed within 60 days of submission
June 13, 2003	Presiding Officer's decision becomes effective 30 days after mailing (unless appeal filed per § 1701.2(a) and Rule 8.2)

It is my goal to close this case within the 12-month timeframe for resolution of adjudicatory proceedings and this schedule meets that goal. At this time, I foresee no extraordinary circumstances which would warrant an extension of the schedule.

Category of Proceeding and Need for Hearing

This ruling confirms this case as an adjudication scheduled for hearing, as preliminarily determined by the Commission.

Assignment of Presiding Officer

Administrative Law Judge Anne Simon will be the presiding officer.

Ex Parte Rules

Ex parte communications are prohibited in adjudicatory proceedings under § 1701.2(b) and Rule 7.

IT IS RULED that:

1. The scope of the proceeding is as set forth herein.
2. The schedule for this proceeding is set forth herein.
3. The presiding officer will be Administrative Law Judge Simon.
4. This ruling confirms that this proceeding is an adjudication scheduled for hearing.
5. Ex parte communications are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7 of the Commission's Rules of Practice and Procedure.

Dated October 8, 2002, at San Francisco, California.

/s/ CARL WOOD
Carl Wood
Assigned Commissioner

APPENDIX

Prepared Written Testimony and Exhibits

Service

All prepared written testimony should be served on all appearances and state service on the service list, as well as on the Assigned Commissioner's office and on the Assigned ALJ. Prepared written testimony should NOT be filed with the Commission's Docket Office.

Identification of Exhibits in the Hearing Room

Each party sponsoring an exhibit should, in the hearing room, provide **two copies to the ALJ and one to the court reporter**, and have at least 5 copies available for distribution to parties present in the hearing room. **The upper right hand corner of the exhibit cover sheet should be *blank* for the ALJ's exhibit stamp.** Thus, if parties "premark" exhibits in any way, they should do so in the upper left hand corner of the cover sheet. Please note that this directive applies to cross-examination exhibits as well. If there is not sufficient room in the upper right hand corner for an exhibit stamp, please prepare a cover sheet for the cross-examination exhibit.

Cross-examination With Exhibits

As a general rule, if a party intends to introduce an exhibit in the course of cross-examination, the party should provide a copy of the exhibit to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. Generally, a party is not required to give the witness an advance copy of the document if it is to be used for purposes of impeachment or to obtain the witness' spontaneous reaction. An exception might exist if parties have otherwise agreed to prior disclosure, such as in the case of confidential documents.

Corrections to Exhibits

Generally, corrections to an exhibit should be made in advance and not orally from the witness stand. Corrections should be made in a timely manner by providing new exhibit pages on which corrections appear. The original text to be deleted should be lined out with the substitute or added text shown above or inserted. Each correction page should be marked with the word "revised" and the revision date.

Exhibit corrections will receive the same number as the original exhibit plus a letter to identify the correction. Corrections of exhibits with multiple sponsors will also be identified by chapter number. For example, Exhibit 5-3-B is the second correction made to Chapter 3 of Exhibit 5.

(END OF APPENDIX)

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner on all parties of record in this proceeding or their attorneys of record.

Dated October 8, 2002, at San Francisco, California.

/s/ JEANNIE CHANG

Jeannie Chang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.